NO. 82-5637

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

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SUPREME COURT, U.S.

WILLIAM BERRY,
Appellant

v.

COMMONWEALTH OF PENNSYLVANIA,
Appellee

On Appeal from the Supreme Court of Pennsylvania (Pennsylvania Supreme Court No. 680 E.D. Misc. Docket 1981; Pennsylvania Superior Court No. 1564, Philadelphia 1980; Philadelphia Common Pleas Court Information 1307, August Term, 1979).

MOTION OF APPELLEE TO DISMISS

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MOTION TO DISMISS

Appellee, Commonwealth of Pennsylvania, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that the appeal be dismissed because the federal question here raised was not properly raised below, because the state courts' judgment below rests on an adequate non-federal basis, and because there is no substantial federal question presented here.

QUESTION PRESENTED

Has defendant waived his challenge to the constitutionality of the Pennsylvania Rape Shield Law, as applied below?

STATEMENT OF THE CASE

Defendant, William Berry, appeals from the judgments of sentence for indecent assault, imposed by the Pennsylvania courts. Because he did not present to the state courts the federal questions he now raises, there are no federal questions before this Court, which should dismiss.

The trial evidence showed that on the evening of August 10, 1979, Ms. Deborah Young awakened when defendant, her stepfather, put his penis in her vagina. She immediately reported the incident to the police, who charged defendant with rape and indecent assault. A chemist testified at defendant's trial that although Ms. Young had no sperm in her vagina, there were traces of recent male ejaculate. Defendant sought to cross-examine Ms. Young on her sexual activity that night, presumably to establish that another had deposited the ejaculate. The trial judge, the Honorable Curtis C. Carson, Jr., citing the Pennsylvania Rape Shield Law, 18 Pa.C.S.A. §3104, precluded such questioning, but allowed

defendant to produce extrinsic evidence of the victim's prior sexual activity. Defendant chose not to do so. Nor did defendant cross-examine the victim on her prior sexual history after the prosecutor later opened the door to such questioning. The jury acquitted defendant of rape and convicted him of misdemeanor indecent assault.

Despite defendant's lengthy criminal record, his misdemeanor conviction allowed imposition of only a minimal jail sentence which defendant has already served. Defendant appealed to the Pennsylvania Superior Court, which affirmed in an rereported, non-precedential opinion.[1] Commonwealth v. Berry, No. 1564, Philadelphia 1980 (Pa. Superior filed 11/30/81). The Pennsylvania Supreme Court denied discretionary review. Commonwealth v. Berry, No. 680 E.D. Misc. Docket 1981 (Pa. filed 8/30/82). Defendant now appeals to this Court pursuant to 28 U.S.C. §1267(2), alleging that the Rape Shield Law, as applied below, violates the sixth amendment. Since claim was not properly raised in the state courts, however, this Court must dismiss.

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[1] See Strazzella, The Binding Nature of Pennsylvania Appellate Opinions: Some Problems After the Appellate Reorganization, 4 Pennsylvania Legal Journal Reporter, No. 26, p.1, 10 (July 6, 1981).

ARGUMENT

THE APPEAL SHOULD BE DISMISSED BECAUSE IT IS BASED ON NON-EXISTENT, WAIVED, AND NON-COGNIZABLE CLAIMS.

Defendant's appeal is not properly before this Court: (1) because the victim was questioned on her prior sexual history, there is no confrontation question here, or, indeed, any federal question whatsoever; (2) defendant strategically waived his challenge to the Rape Shield Law; (3) defendant concedes that his remaining allegation is not cognizable (Jurisdictional Statement at 20 n.*).

A. There is no federal question here: the victim testified as to her sexual activity on the evening of the assault.

At trial, defendant viciously cross-examined Ms. Young, casting grave aspersions on her sobriety and chastity on the evening of the assault (N.T. 83-113). Thus, on redirect examination, the prosecutor questioned Ms. Young as follows:

> BY [THE PROSECUTOR]:
>
> Q. Debbie, the lawyer went in to a lot of questions about where you went and who you were with so I'm going to have to ask you this question. Did you have sexual intercourse with anybody else that evening?
>
> A. (By Ms. Young): No.

(N.T. 114).

Thus, contrary to defendant's allegations, Ms. Young was questioned on her prior sexual history. Accordingly, there is no federal question in this case. Commonwealth v. Richardson, 476 Pa. 571, 584 n.3, 383 A.2d 510 n.3, cert. denied, 436 U.S. 910 (1978) (there is no prejudice caused by restricting defense cross-examination of a prosecution witness if the information sought is elicited from other witnesses).

B. At trial, defendant strategically waived his challenge to the constitutionality of the Rape Shield Law.

Once the prosecutor asked the victim about her prior sexual activity, he undoubtedly opened the door to similar defense questioning.[2] Defendant neither asked such questions nor presented any extrinsic evidence of Ms. Young's alleged sexual activity that night -- as Judge Carson permitted him to do -- despite his assertion that he had a witness who could testify to her social encounters (N.T. 11). There was an obvious strategy for this inaction: rather than risk the victim's repeated denials of other sexual activity, defendant instead speculated and further smeared Ms. Young, in his jury closing:

> Another thing, is it all that unusual for Miss Young to have residue of sexual activity? Miss Young has two children, I assume that at some point in her life she did have consensual sexual activity and I don't think it is beyond the realm of possibility or common sense to believe that in addition to those two occasions, she has consensual sexual activity at other times.

(N.T. 213).

Under Pennsylvania law, defendant's use of this strategy undoubtedly waived his present constitutional challenge to "restricted" cross-examination under the Rape Shield Law. Commonwealth v. Smith, 487 Pa. 626, 632, 410 A.2d 787, 790 (1980); Commonwealth v. Clair, 458 Pa. 418, 326 A.2d 272 (1974).

Although the Superior Court, in its unpublished, non-precedential opinion, appeared to pass on the merits of defendant's constitutional claim, it is apparent that the Pennsylvania Supreme Court declined to review the claim because defendant had not properly raised the claim at trial and so waived it. Thus, this Court

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[2] See Commonwealth v. Sisco, 484 Pa. 85, 88-89, 398 A.2d 955, 957 (1979) (prosecutor properly explored inadmissible testimony that defense counsel had already elicited); Commonwealth v. Slaughter, 482 Pa. 538, 543-44, 394 A.2d 453, 455 (1978) (same).

is without jurisdiction to hear this case because "the question of the existence of an adequate state ground is debatable." Steinbridge v. Georgia, 343 U.S. 541, 547-48, 72 S. Ct. 834, 838, 96 L.Ed. 1130 (1952).

C. On appeal, defendant again waived his constitutional challenge to the Rape Shield Law.

Under state law, defendant was obligated to notify the Pennsylvania Attorney General of his constitutional challenge or waive the claim.[3] Defendant failed to give this notice, and so again waived his challenge to the Rape Shield Law. Thus, this Court is again without jurisdiction to review the Pennsylvania courts' decisions below, which are almost certainly supportable on independent state grounds.

D. As defendant concedes, his remaining claim is non-cognizable; in addition, it warrants dismissal because it is thrice waived and without substance.

Defendant's trial strategy is apparent: he sought to prosecute the victim, impugning her character at every opportunity (N.T. 83-113, 161, 162-64, 165, 169-70, 181). Thus, Judge Carson was repeatedly forced to curtail the introduction of inflammatory, irrelevant evidence and focus the jury's attention on the question before them: whether defendant attacked the victim. For instance, the Commonwealth presented equivocal testimony that the ejaculate found in Ms. Young's vagina and the sperm stains found on the undershorts defendant wore on August 10, 1979, might have been left by the same man. Defendant hotly disputed this, arguing

[3] Pa.R.A.P. 521; Commonwealth v. Duncan, 279 Pa. Superior Ct. 395, 398-99 n.3, 421 A.2d 257, 259 n.3 (1980); Commonwealth v. Ashford, 268 Pa. Superior Ct. 225, 228 n.3, 407 A.2d 1328, 1330 n.3 (1979). But see Commonwealth v. Linder, 284 Pa. Superior Ct. 327, 425 A.2d 1126 (1981).

repeatedly that the sperm stains were the result of defendant's sexual activity with his wife that evening (see e.g. N.T. 212-13). Judge Carson permitted defendant to advance this highly speculative theory which was successful; defendant was acquitted of the rape charge. In attempting to focus the jury's attention on the issue before them, however, the judge did not allow defendant's wife describe their sexual activities that evening. Defendant now contends that this ruling unconstitutionally precluded him from putting on a defense. This Court must dismiss because (1) the claim is not cognizable, as defendant concedes; (2) the claim was thrice waived; and (3) there is no substantial federal question here.

1. Cognizability

Defendant concedes that his remaining issue "is not capable of being brought on appeal," but contends that he can somehow join it to the Rape Shield claim (Jurisdictional Statement at 20 n.*). Since that claim is not properly before this Court (see Arguments A-C, supra), the remaining issue, too, may not now be reviewed.

2. Waiver

The theory of defendant's objection was changed from trial to appeal. At trial, in his "Statement of Matters Complained of on Appeal," and in his post-verdict motions, defendant alleged only that Judge Carson's ruling was erroneous (N.T. 187-90). He raised his present sixth amendment claim for the first time before the Superior Court. In changing the theory of his objection, defendant waived both theories.[4]

Once again it is certainly debatable as to whether the Pennsylvania courts' rulings are supported by an independent, adequate

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[4] Commonwealth v. Green, 477 Pa. 170, 180, 383 A.2d 877, 881-82 (1978); Commonwealth v. Stolzfus, 462 Pa. 43, 59-60, 337 A.2d 873, 881, appeal dismissed, cert. denied 419 U.S. 1065 (1974); Commonwealth v. Lowery, ___ Pa. Superior Ct. ___, 410 A.2d 867, 868 (1979), discretionary review granted on unrelated issue, Commonwealth v. Lowery, E.D. Allocatur Docket No. 4608 (Pa. 3/17/80).

state ground. Accordingly, this Court is without jurisdiction here and should dismiss this appeal.

3. Lack of Federal Question

Judge Carson undoubtedly was obligated to conduct defendant's trial fairly and efficiently. In precluding defendant from telling the jury of his wife's sexual history, the judge simply did not prejudice defendant, as the judge himself stated:

> These are things that you are going to subsequently argue, in fact it opens the door and doesn't even limit you in any way.
>
> [Defense Counsel]: Fine.

(N.T. 190).

Accordingly, defense counsel argued at length that the stains were the result of his having sex with his wife that evening:

> [Defense Counsel]: And I want to talk just a bit more about sperm on Mr. Berry's shorts. Now, you heard, they testified they found sperm on Mr. Berry's shorts. Nobody testified how recent it was but consider this, ladies and gentlemen, in fact consider two things. Mr. Berry, you have heard through testimony is married, you heard that he was sleeping with his wife on the night that this happened? Is it all that unusual for a married person who sleeps with his wife to have sperm, seminal fluid on his boxer shorts? No, it isn't.

(N.T. 212-13).

Defendant's argument was effective: the jury acquitted him of the rape charge, convicting only on the misdemeanor indecent assault.

Thus, assuming Judge Carson's actions occasioned any error, it undoubtedly is so insignificant as to warrant dismissal for want of a substantial federal question.[5]

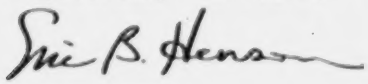
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[5] See Palmer Oil Corp. v. Almeida Petroluem Corp., 343 U.S. 39, 72 S. Ct. 843 (1952); Zucht v. King, 260 U.S. 174, 43 S. Ct. 24 (1922); Equitable Life Assurance Society v. Brown, 187 U.S. 308, 311, 23 S. Ct. 123, 124 (1902).

CONCLUSION

For the reasons stated herein, this appeal must be dismissed.

Respectfully submitted,



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COMMONWEALTH OF PENNSYLVANIA, Appellee	:	NO. 82-5637

CERTIFICATION OF SERVICE

I, ERIC B. HENSON, Counsel for Appellee, hereby certify that I have served three (3) copies of this Motion of Appellee to Dismiss by hand delivery upon counsel for appellant, John W. Packel, Esquire, Defender Association of Philadelphia, 121 North Broad Street, Philadelphia, Pennsylvania 19107, on December 28, 1982.

Eric B. Henson

ERIC B. HENSON
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Sworn to and subscribed :
before me this 28th day :
of December, 1982, A.D. :

Nerdia R. Green
NOTARY PUBLIC

My Commission Expires: April 21, 1986

IN THE SUPREME COURT OF THE UNITED STATES

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Eric B. Henson

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Sworn to and subscribed :
before me this 28th day :
of December, 1982, A.D. :

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My Commission Expires: April 21, 1986